

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEKI KIWAN ANDERSON,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 289854

Wayne Circuit Court

LC No. 08-012127-FH

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant Neki Kiwan Anderson appeals as of right his jury convictions for carrying or possessing a firearm while ineligible to do so (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, carrying or possessing a firearm during the commission of a felony (felony firearm), MCL 750.227b, and resisting arrest, MCL 750.81d(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, and ordered defendant to serve two years in prison for the felony firearm conviction, which sentence was to be served consecutively to defendant's sentences for being a felon-in-possession and resisting a police officer. The trial court sentenced defendant to serve 46 months to 25 years in prison for both his conviction for being a felon-in-possession and for his conviction for CCW. Finally, the trial court sentenced defendant to serve ten months to 15 years in prison for resisting arrest. Defendant received 18 days' credit toward his sentence for the felony firearm conviction.

On appeal, defendant argues that his trial counsel was ineffective, that the trial court erred when it ordered defendant to serve his sentence for felony firearm consecutive to his sentence for resisting a police officer, and that his judgment of sentence should properly reflect 18 days' credit toward his sentences for CCW and resisting arrest and should not reflect an order to pay \$400 in reimbursement for attorney fees. We conclude that defendant has failed to demonstrate that his trial counsel was ineffective. However, we agree that the trial court erred when it ordered defendant to serve his sentence for felony firearm consecutive to his sentence for resisting arrest, agree that defendant is entitled to 18 days' credit toward each of his sentences except his sentence for being a felon-in-possession, and agree that the judgment of sentence should not have reflected an order to reimburse \$400 for attorney fees. For these reasons, we affirm defendant's convictions, but remand for corrections to defendant's judgment of sentence.

I. BASIC FACTS AND PROCEDURAL HISTORY

Trooper James Grubbs of the Michigan State Police testified that he and his partner, Trooper Daniel Stickel, were patrolling in Detroit during the early morning hours of August 30, 2008. Grubbs said that he was driving south on McDougall when he saw a Jeep driving north on the same street. He said the driver of the Jeep made a u-turn and drove south. Grubbs characterized the turn “as a rather wild U-turn.” Grubbs also stated that the Jeep proceeded south in the lane for northbound traffic. Grubbs testified that he decided to stop the Jeep for improper lane usage. Grubbs said that the Jeep had four persons in it including the driver: three men and a woman.

Grubbs said that he approached the Jeep from the driver’s side while his partner approached from the passenger side. He stated that the Jeep did not have its top on and when he neared defendant, who was the driver, he smelled “a strong odor of alcohol emanating from both his breath and his person.” After he asked defendant for his license and insurance, Grubbs said that Stickel alerted him to the presence of open intoxicants in the Jeep.

Stickel testified that he shined his flashlight around the Jeep and saw “two plastic cups and what appeared to be—what smelled to be intoxicants on the floor.” He said that there was “white froth” and that it “appeared they had just poured their alcohol out.” Stickel said he told Grubbs about his observations. Grubbs then asked defendant to get out of the Jeep and arrested him for transporting an open intoxicant.

After he handcuffed defendant, Grubbs brought defendant behind the Jeep and patted him down. Grubbs testified that during the pat-down search he discovered that defendant had a .45 caliber Smith and Wesson automatic handgun tucked in the front of his pants. He said that defendant began to resist: defendant “was first trying to pull away and then tried to kick and just essentially trying to get away.” Defendant continued to fight even after his partner came to his assistance and, as a result, Stickel “deployed a Tazer” to subdue defendant. Grubbs said that he also sprayed defendant with pepper spray. After this, they were able to get defendant into the back of their patrol car. He also testified that defendant was given a preliminary breath test, which showed that defendant had a blood alcohol level of .08. Grubbs said that he and his partner had the Jeep towed, but let the passengers go. He wrote two citations to defendant—one for careless driving and one for transporting open alcohol in a motor vehicle.

Before trial, defendant’s trial counsel tried to have the evidence that defendant had a handgun suppressed. In his motion, defendant’s trial counsel argued that defendant did not actually drive down the wrong lane after his turn and, for that reason, Grubbs could not lawfully stop defendant. The trial court rejected defendant’s contention that the stop was unlawful and denied the motion.

At trial, defendant’s counsel called the three passengers as witnesses. Counsel tried to establish through these witnesses that defendant did not violate any traffic laws. Indeed, one of the passengers, Victoria Holloway, testified that she had not been drinking, that there was no alcohol in the Jeep, and that defendant had done nothing wrong. Another passenger, Lawrence Holloway, testified that the troopers had no right to treat them the way they did: “[W]e weren’t being stopped for anything crucial enough to warrant such a thing. I mean to the best of our knowledge, it must have just been a routine traffic stop because we weren’t speeding or

anything, we weren't driving wild." Two of the passengers even testified that it would be impossible to drive the wrong way after making a u-turn on McDougall.

Defendant's trial counsel also tried to show that Grubbs was an overzealous officer who approached the Jeep with his gun drawn and roughly handled defendant. Lawrence Holloway testified that the troopers approached with their guns drawn and Grubbs asked defendant if he had been drinking. After defendant answered, Grubbs purportedly "snatched out" defendant and later slammed him into the car. Victoria Holloway agreed with defendant's trial counsel that Grubbs just kept "beating" and "pulling" defendant. And Darnell Davis testified that the troopers approached with their guns drawn and screamed at them.

In closing, defendant's trial counsel invited the jury to find defendant not guilty on the basis of Grubbs' behavior:

We have here an impossible situation and it's crafted by Grubbs. He got a little bit too overzealous and we must stop this, somebody has to stop this. There are things called the Fourth Amendment, you have a right to your privacy, whether in a vehicle, boat or your home. People weren't doing anything wrong.

He also argued that Trooper Grubbs' account of the events was implausible and noted that none of the three defense witnesses mentioned seeing a gun. For these reasons, he asked the jury to find his client not guilty.

The jury returned a verdict of guilty on all counts. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARDS OF REVIEW

On appeal, defendant first argues that he did not receive the effective assistance of counsel. Specifically, defendant argues that his trial counsel had an obligation to investigate whether there was a camera equipped in the police car used by the troopers who stopped defendant and that his failure to make that investigation was unreasonable and prejudiced defendant's trial. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. This Court reviews *de novo* the determinations of constitutional law and reviews the factual findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, where—as is the case here—there has been no evidentiary hearing and no findings of fact by the trial court, this Court's review is limited to mistakes that are apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. ANALYSIS

In order to establish ineffective assistance of counsel warranting relief, a defendant must show that his trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Defendant argues that his trial counsel's performance was deficient because he failed to investigate whether the troopers' patrol car was equipped with a camera at the time of the stop.

Defendant argues that, had the car been equipped with a camera, it might have shown that the stop was illegal. However, the failure to investigate a particular matter does not necessarily establish the ineffective assistance of counsel.

In *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Supreme Court of the United States explained that a defendant's trial counsel has a duty to make decisions concerning trial strategy only after reasonable investigations concerning the relevant law and facts:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Thus, an attorney is not ineffective for failing to investigate if the decision not to investigate was reasonable under the circumstances. Accordingly, in order to show that his trial counsel's investigatory decision fell below an objective standard of reasonableness, defendant had to show that under the circumstances it was unreasonable for his trial counsel to make the decision not to investigate. In addition, to show prejudice, defendant had to show that the failure to investigate resulted in counsel's ignorance of valuable evidence that would have substantially benefited defendant. See *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990).

In this case, the record does not support defendant's claim that his trial counsel acted unreasonably. Defendant has not presented any new evidence concerning whether and to what extent his attorney took steps to investigate. There is also no record evidence that defendant's trial counsel actually failed to investigate whether there was a camera and recording and no record evidence concerning whether defendant's trial counsel had conflicting accounts about the events leading to the stop. On this record, it is entirely plausible that defendant's trial counsel chose not to investigate because he had good reason to believe that any recording would be harmful to his client—that is, defendant's trial counsel may have made a strategic decision not to call attention to any potential recording of the stop. See *Strickland*, 466 US at 691 (“[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.”). This Court will not “substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Likewise, defendant has not presented any evidence concerning the content of an actual recording of the events at issue. Indeed, defendant has not even presented evidence that the police cruiser was equipped with a functioning camera that might have recorded the events and which might have been available for discovery during the timeframe at issue. On this record, this Court can only speculate about what an investigation might have yielded. In the absence of any evidence capable of establishing the nature of the harm caused by defendant's trial counsel's

alleged deficient conduct, we cannot conclude that the decision not to investigate prejudiced defendant. Defendant has not met his burden of proof. *Strickland*, 466 US at 694 (noting that the defendant bears the burden of showing that his or her trial counsel's deficient conduct resulted in prejudice). Consequently, he has failed to demonstrate error that warrants relief.

III. SENTENCING ERRORS

Defendant also argues that, under MCL 750.227b, the sentence for a felony firearm conviction is to be served consecutive to the predicate felony underlying the charge. In this case, the predicate felony was felon-in-possession. Accordingly, defendant argues, the trial court erred when it ordered him to serve his felony firearm sentence consecutively to both his sentence for being a felon-in-possession and his sentence for resisting arrest. See *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000) (explaining that a sentence for felony firearm can be consecutive only to the sentence for the specific underlying felony). Moreover, because his sentence for felony firearm cannot be consecutive to his sentences for resisting arrest and CCW, defendant contends that he was entitled to 18 days' credit on both sentences. See MCL 769.11b. Finally, defendant notes that he retained his own counsel and, therefore, it was error for his judgment of sentence to include an order to reimburse \$400 in attorney fees.

On appeal, the prosecution agrees that it was error for the trial court to order defendant to serve his felony firearm sentence consecutively to his resisting arrest sentence and agrees that defendant should have received 18 days' credit on his sentences for CCW and resisting arrest. The prosecution also acknowledges that defendant retained his own counsel and does not object to correction of the judgment of sentence to reflect that defendant does not have to reimburse \$400 in attorney fees. Given the prosecution's acknowledgment that defendant is entitled to the requested sentencing relief, we remand this case to the trial court to make these corrections.

Affirmed, but remanded for corrections to the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder